MICRO CARD
TRADE MARK ®
22
MATTHEW BENDER & COMPANY
MB
PC 92
-64-6
microcard

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S
FILED
JUL 27 1963
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1963

No. 267

HENRY HONEYWOOD, FREDONIA HONEYWOOD, JOHN E. PERRY and HELEN PERRY, individually, jointly, in behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

against

NELSON A. ROCKEFELLER, Governor of the State of New York; CAROLINE K. SIMON, Secretary of State for the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of the Board of Elections of the City of New York; and SEYMOUR HALPERN, Member of Congress, Representing the Fourth Congressional District of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney pro se and for Appellees
Rockefeller and Simon
80 Centre Street
New York 13, New York

IRVING GALT
Assistant Solicitor General
SHELDON RAAB
Assistant Attorney General
of Counsel

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

INDEX

	PAGE
Statute Involved	2
Question Presented	2
Statement of the Case	2
Decision Below	4
Argument	6
Conclusion	14
Appendix (Defendants-appellees' Exhibit A)	15

CASES

Gomillion v. Lightfoot, 364 U. S. 339 (1960)	8, 10, 11
Metropolitan Casualty Ins. Co. v. Brownell, 294 U. S. 580 (1935)	6
Morey v. Doud, 354 U. S. 457 (1957)	6
Wood v. Broom, 287 U. S. 1 (1932)	7

STATUTES AND LEGISLATIVE MATERIAL

2 U.S.C. § 2(a)	2
Hearings, Standards for Congressional Districts, H.R. Comm. on the Judiciary, Sub-Comm. No. 2, 86th Cong. 1st Sess.	7
New York Laws of 1961, ch. 980	2
New York Legislative Document No. 45 (1961)	7

Supreme Court of the United States

OCTOBER TERM, 1963

No. 267

HENRY HONEYWOOD, FREDONIA HONEYWOOD, JOHN E. PERRY and HELEN PERRY, individually, jointly, in behalf of themselves and others similarly situatd,

Plaintiffs-Appellants,

against

NELSON A. ROCKEFELLER, Governor of the State of New York; CAROLINE K. SIMON, Secretary of State for the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of the Board of Elections of the City of New York; and SEYMOUR HALPERN, Member of Congress, Representing the Fourth Congressional District of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellees Governor, Secretary of State and Attorney General, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument, or, in the alternative, that this appeal be dismissed.

Statute Involved

Extracts from the challenged statute, Chapter 980 of the New York Laws of 1961, are set forth in Appendix B of appellants' jurisdictional statement. The statute in question, enacted on November 19, 1961, redistricted New York for the purpose of the 1962 Congressional elections. It was made necessary by the State's loss of two seats in the House of Representatives as a result of the 1960 decennial census. See 2 U.S.C. § 2(a).

Question Presented

Did the District Court err in finding that appellants failed to prove their allegations of racial and partisan gerrymandering?

Statement of the Case

Appellants brought this action seeking a declaration that Chapter 980 of the New York State Laws of 1961 violates the Fourteenth and Fifteenth Amendments of the Constitution of the United States and an order enjoining defendants from enforcing or executing that statute. Appellants allege that they are residents of the former Fourth Congressional District, and that the "Fourth Congressional District is practically identical with the new Sixth Congressional District except that certain neighborhoods [in which appellants reside] which are part of the Fourth Congressional District, have been excluded from the new Sixth Congressional District, while other neighborhoods, not a part of the Fourth Congressional District, are included in the new Sixth Congressional District." (Complaint, par. 9.) They go on to allege that the redistricting "was solely for the benefit of the present congressional representative, the political party he represents, and not for the well-being of the citizens of the [former] Fourth Congressional

District * * *". Furthermore, they allege that they are the victims of a "purposeful and systematic drawing of boundary lines to 'fence the Negro citizens out' of the new Sixth Congressional District."

Before going to trial, appellants moved for a preliminary injunction restraining enforcement of Chapter 980 pending final disposition of the action. After a hearing, a statutory three-judge Court denied appellants' application for a preliminary injunction. On October 8, 1962, this Court affirmed the order denying a preliminary injunction. 371 U. S. 1 (1962).

A hearing on the merits was held before the three-judge District Court on September 10-11, 1962.

Appellants presented seven witnesses. Two of them, William Nance and John Perry, testified merely that they resided in the affected area and objected to the redistricting. Two others, Walter Sommer and Esiah Friedman, testified that the southern boundary of the new Sixth District coincided with the northern boundary of the Negro neighborhood. The fifth witness, Michael Dubin, testified that one of the neighborhoods that used to be part of the old Fourth District, but is not part of the new Sixth, is predominantly Negro. The sixth witness, State Senator Joseph Zaretzki, testified that the Act was passed according to law at an extraordinary session convened by the Governor and that he had not seen the proposed Act before it was introduced in the Legislature. The last witness, David Wells, discussed the geographic contours of some of the new districts created in New York City, and concluded that the new Act was more favorable to the Republican than to the Democratic party.

Appellees presented no witnesses. Instead, they presented two exhibits for the aid of the Court. The first (marked Defendants' Exhibit A in evidence) consisted of four statistical tables compiled by the Bureau of the Census and certified by its Director. These tables showed

the 1960 population by race of the old Fourth, Fifth and Sixth Congressional Districts and the areas which comprise the new Sixth, Seventh and Eighth Districts. In addition, the tables showed the 1960 population by race of each area in the new districts that was formerly included in the old Fourth, and of each area taken from the old districts to make up the new Sixth. The second exhibit (marked B for identification) was a photocopy of the map of the old Fourth and new Sixth Districts which had been annexed to the complaint and received in evidence. On it, appellees indicated (1) each area which was part of the old Fourth but was not included in the new Sixth, or which was part of new Sixth but had not been part of the old Fourth, and (2) the old and new Congressional District embracing each of these areas. Thus, appellees' two exhibits, when read together, present a complete graphic and statistical picture of the effect of Chapter 980 on the portion of Queens involved in this action.

All parties moved for judgment at the close of the hearing (356)*.

Decision Below

The three-judge District Court held that appellants failed to sustain the burden of proving either racial or partisan gerrymandering.

Writing for a unanimous Court, Judge Moore pointed out that the New York State Legislature had to redistrict the area involved in this action in order to keep abreast of population changes which had occurred between the 1950 and 1960 censuses. He noted that several neighborhoods inhabited by white persons, as well as a Negro neighborhood, were taken from the old Fourth District and placed in other districts. And he held that "it would be

---

* All numbers in parentheses refer to pages in the transcript of the hearing on the merits, unless otherwise indicated.

the height of unwarranted speculation" to conclude, as did appellants, that one of the "excluded" neighborhoods—containing about 15,000 white persons—was left out of the new Sixth District in order to "exclude" 384 Negroes who also reside in the same neighborhood. Moreover, he stressed that the portion of the southern boundary of the Sixth District which appellants had characterized as a "color line" was, in fact, a logical dividing line between districts, since it consisted of a concrete railroad abutment and several large thoroughfares. He concluded, therefore, that appellants failed to prove their first cause of action.

He then turned to the second cause of action, which charged that the entire redistricting statute was unconstitutional because it was passed for partisan purposes. Again, he held that appellants failed to prove their claims. He pointed out, first, that the testimony of the State Senate Minority Leader that the bill was passed without a public hearing was of no moment since the rules of the Legislature imposed no such requirement. Then, he turned to an analysis of the testimony of appellants' "expert", who predicted that the redistricting Act would result in heavy gains in the 1962 Congressional elections for the Republican party, which is the majority party in the State Legislature. This testimony focused on the new 14th, 15th and 16th Districts, as well as on the Sixth District. He pointed out that the incumbent Republican in the Sixth District, Congressman Halpern, had carried the District by 21,000 votes in 1960, despite the fact that President Kennedy received a majority of that District's votes in the same year; moreover, there are more Democrats than Republicans registered in that District. Thus, he found that appellants, far from proving a gerrymander, had proven that "people in the District voted on the basis of the individual candidate rather than on strict party lines." The other three Districts, located in Brooklyn and Staten Island, like the Sixth District, were created on the basis of

approximate equality in population. Paradoxically, despite the predictions of appellants' "expert", the Democratic candidates carried all three Districts.

Argument

The decision below rests on a purely factual determination—and a clearly correct one, at that. The evidence showed that appellants' reckless charges were wholly unfounded. Far from being the product of a racial gerrymander, the Sixth Congressional District was created on the basis of logical boundary lines, achieved approximate equality of population, and shows no hint of any discriminatory design. And the challenged statute, far from being a sinister device for furthering the majority party's interest, proved to be a fair means of dividing New York into districts of approximately equal population, in which the minority party—as is eloquently shown by the election returns—is quite able to hold its own. There is no basis whatever for review in this Court.

(A)

Appellants' burden is to show that the redistricting statute "does not rest upon any reasonable basis, but is essentially arbitrary." *Morey* v. *Doud*, 354 U. S. 457, 464 (1957). See *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584 (1935). There are, obviously, a great many factors which a legislature takes and ought to take into account in drawing district lines. The economics of a neighborhood, its traditions, transportation, natural boundaries, the interplay of business and residential districts, the preservation of well-established district lines, and many other factors must be taken into account in any successful single-member district system. The overwhelming truth here is that appellants have not only failed to rebut

these rational criteria—but their own witnesses have suggested rational criteria that support the present district lines on considerations completely divorced from gerrymandering or segregation.

First, it was necessary, in order to achieve reasonable parity in population between adjoining districts, to redraw the lines so as to remove territory from the old Fourth and add it to the old Fifth District. Mr. Dubin, appellants' "expert" witness, agreed to this elementary proposition (283-86) and he is borne out by the figures shown in defendants-appellees' Exhibit A (See Appendix, *infra*). By 1960, the old Fourth contained 467,384 people while the old Fifth contained only 391,403 people. The New York State Legislature, despite the absence of a Congressional standard mandating numerical equality (*Wood* v. *Broom*, 287 U. S. 1 [1932]), has adhered voluntarily to a maximum variation of 15% from average population per district, the variation recommended by the American Political Science Association and endorsed by former Present Truman. New York Legislative Document No. 45 (1961); Hearings, Standards for Congressional Districts, H. R. Comm. on the Judiciary, Sub-Comm. No. 2, 86th Cong. 1st Sess., pp. 26, 29 (Serial No. 10, June 24 and Aug. 19, 1959). The population figures for the new Sixth and Seventh Districts—417,367 and 459,844, respectively—considerably close the gap that existed between the old Fourth and Fifth Districts; at the same time, the new figures are comfortably within the self-imposed maximum 15% variation from the average population per New York State Congressional District of 409,326. Thus, the redistricting Act was fully in line with the most obvious purpose of redistricting—achieving a rough population parity.

Second, appellants themselves have established that the district lines follow natural boundary lines. Lieutenant Friedman testified (108-15) and appellants' counsel pointed out in his opening statement (8) that a thirty-foot high

railroad wall runs along the entire length of Archer Avenue, more than two miles out of the five-mile stretch of the southern boundary of the new Sixth District which appellants contend is a "color line". The walled area is sixty feet thick and the only way to get through it is by using specially provided tunnels. What more natural place is there to separate Congressional Districts?

We have thus far argued that appellants' failure to rebut the rationality of the 1961 lines—and, most certainly, their convincing demonstration of that rationality—dooms their case. Yet, for our purposes, this argument is sufficient but hardly necessary. For it developed at the trial that even appellants' allegations of a boundary line dividing whites from Negroes and of a sinister partisan gerrymander are nothing but pure sham.

(B)

In an obvious attempt to capitalize upon this Court's decision in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), appellants' verified complaint made a good many reckless charges. It is useful to examine the allegations in light of later events at the trial.

• Appellants alleged that the "color line" runs (Complaint, p. 8) along Hollis Avenue easterly to an apex, "thence straight with a northeasterly curve to meet Springfield Boulevard, thence southerly along part of Springfield Boulevard to where it meets Linden Boulevard. *This line then turns east towards Nassau County.*" (Emphasis supplied). At the trial, it developed that the area south of Linden Boulevard to the county line is white and appellants modified their claims accordingly (85).

• Appellants alleged that the "color line" also runs (Complaint, p. 8-a) on the southern perimeter of Area "B" as far west as Woodhaven Boulevard. When this, too, proved false (47-49), appellants asked that their com-

plaint be modified to show that the "color line" was claimed to exist only along a portion of the southern boundary of the Sixth District.

Appellants alleged ~~that~~ (Complaint, p. 8-a) "Negroes reside in the newly excluded area ['C']." At the trial, appellants conceded (143) that there were more white than colored in "C". It later developed that this was a masterpiece of understatement; of 15,000 persons in "C", only 384 are Negroes (213).

After the complaint had been transformed by the glare of reality, appellants' case rested on one remaining piece of the map—the five-mile stretch, which they still contended was a "color line," from Archer Avenue and Van Wyck Expressway east to Springfield and Linden Boulevards. Assuming *arguendo* that this line actually sharply separated Negroes from whites, had appellants made out a *prima facie* case? We think not.

Of the five-mile "color line," more than two miles were made up of the Archer Avenue wall and another considerable span consisted of a portion of Jamaica Avenue which had constituted the boundary line of the old Fourth District before the new lines were drawn. This left only the northern boundary of Area "A"—a mile, perhaps two miles in length—to serve as the springboard for tainting an Act of the New York Legislature and for demonstrating a deliberate desire to exclude Negroes from the Sixth District.

There were at least five clearly discernible, contiguous areas other than "A" which were part of the old Fourth but were "excluded"—to use appellants' term—from the new Sixth (Defendants-appellees' Exhibit B), and each of them is a predominately white area (276-82). The entire "excluded" area, including Area "A", numbered 85,800 whites and only 15,116 Negroes (Defendants-appellees' Exhibit A). And the entire five-mile "color line" is but

a small portion of the total perimeter of the Sixth District. Although Mr. Dubin did not know the total mileage of the perimeter (266-67), it is obvious from visual inspection of the map annexed to the complaint that the entire "color line" is at most fifteen per cent of the total perimeter of the District.

Almost all of the "excluded" Negroes came from "A" and were added to the new Seventh (old Fifth) Congressional District. Since that district was underpopulated at the time of the 1960 census, it was necessary to add population to it. A large bloc of whites as well as Negroes was added; contrary to appellants' implication that the new Seventh is a predominately Negro district, it retains the same percentage of Negroes as did the old Fifth (203) —21% (Defendants-appellees' Exhibit A).

These facts—even assuming that appellants could show a "color line" exists—contrast sharply with *Gomillion* v. *Lightfoot, supra.*

Gomillion involved an attempt to alter the boundaries of a city in such a way as to remove all save four or five of its 400 Negro voters while not removing a single white voter or resident, thus depriving these voters of the benefits of residence in that city including the right to vote in municipal elections. This, the Court, noted, "was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering" (364 U. S. at 341)—language borrowed by the appellants in the instant case—and the Court went on to state that the allegations (taken as true, since *Gomillion* came up on a motion to dismiss) were "tantamount for all practical purposes to a mathematical demonstration that the legislation is solely concerned with segregating white and colored voters . . ." And, against this claim, the City authorities were unable to suggest any legitimate function for the redrawing of the municipal boundaries.

In this case we have the very opposite of the *Gomillion* situation. The justification for the redistricting is clear; New York lost two Congressional seats as a result of the 1960 census, and the Districts immediately involved in this action showed wide disparities in population. The mathematics of the redistricting is not at all startling: 23% of the Negro residents (Defendants-appellees' Exhibit A) of the old Fourth District became residents of the new Sixth District (*Compare* Complaint, par. 10, p. 7). Many more whites were "excluded" from the new Sixth District than were Negroes. The differences from *Gomillion* are legion.

The most important difference of all has yet to be explained by appellants. Why would anyone prefer to exclude Negro voters from the Sixth District—where they were always in a very small minority—and include them in the adjoining Seventh District—where they constitute 21% of the total population? If a Legislature wanted to "segregate" a Negro vote, it might be expected to do the very opposite of what has been done here; for example, it might divide the Negro voters between the Sixth and Seventh Districts. This is a far cry from the *Gomillion* situation, where the City authorities, by excluding Negro voters from the boundaries of Tuskegee, were able to disenfranchise them in municipal elections and deprive them of municipal services. In fact, it is impossible to make out any claim of disenfranchisement at all on the facts of the instant case.

So far, we have assumed that appellants actually proved that the "color line" divides whites from Negroes. But the very opposite is true. There are Negroes directly north of Area "A", in the vicinity of Francis Lewis Boulevard and 104th Street (70-71, 87, 256); in fact, Mr. Dubin testified that (257) "there are Negroes throughout the district." To be sure, there may be fewer Negroes north of Area "A" than in it. But a gradual change in

population hardly creates a "color line." And, whatever the terminology, it hardly suffices to meet the burden undertaken by this appellant who would brand a perfectly proper redistricting Act as an exercise in bigotry.

Appellants have utterly failed to prove that the district lines are the results of "segregation." There is absent any evidence at all to support their reckless charges.

(C)

Appellants' charges of partisan gerrymandering proved as ill-founded as were their charges of racial discrimination.

Mr. Dubin testified that 52 per cent of the registered voters in the new Sixth District are Democrats and only 48 per cent are Republicans (236). The District was carried by President Kennedy during the 1960 election by 9,000 votes (241). Congressman Halpern, a Republican, carried the District by 21,000 votes at the same election (241). It is difficult to see how a partisan gerrymander can be shown in a predominately Democratic district created by a Republican legislature. On the contrary, it appears that the incumbent benefits from his personal popularity rather than his party label.

Nor did appellants fare better in their foray into other Districts for evidence of gerrymandering. Mr. Wells' complaint seemed to be (323) that the Brooklyn-Staten Island district was not "contiguous"; but he later admitted that "it all depends on which way you go around" (348) whether or not you find that it is contiguous. His other testimony was based on a "general knowledge of the voting pattern" (330) and amounted to nothing more than a recital that the residents of certain districts tend to favor certain political parties. Mr. Dubin testified that the Republican party was expected to gain 3 to 5 seats at the next Congressional election (235) on the basis of pre-

vious voting patterns (232), but he indicated nothing improper about the Act.

Appellants totally failed to prove their charges of gerrymandering. No one even ventured a guess as to what a "properly" drawn district should look like; it is a safe guess that no one knew the answer. No one testified as to what an "ideal" political balance would be between the two major political parties; again, it is a safe guess that no one knew. And Mr. Dubin, who made an attempt to characterize one of the parties as a minority party on the basis of registration figures, was at a loss to explain how that party elected the present Governor of New York (230-32).

The short of it is that even if it is possible to prove what is an "ideal" political balance and what are the probable results of a forthcoming election, appellants have not done so. They have no more proved a gerrymander than they have proved a "color line"; in fact, at least as to the Sixth Congressional District, they have shown that the new Act creates a district in which the Legislature's majority party has a minority of registered voters.

CONCLUSION

This appeal presents no substantial question. The United States District Court correctly determined that appellants failed to prove the allegations of their complaint. Therefore, the judgment should be affirmed or the appeal dismissed.

Dated: New York, N. Y.
July 26, 1963.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney pro se and for
Defendants-Appellees
Rockefeller and Simon
80 Centre Street
New York 13, New York

Irving Galt
Assistant Solicitor General

Sheldon Raab
Assistant Attorney General,
of Counsel

APPENDIX

Defendants-appellees' Exhibit A

U. S. DEPARTMENT OF COMMERCE

BUREAU OF THE CENSUS

Washington

May 25, 1962

I hereby certify, That according to the official count of the returns of the EIGHTEENTH CENSUS OF THE UNITED STATES, on file in the Bureau of the Census, the population of the current (i.e., 87th Congress) Fourth, Fifth, and Sixth Congressional Districts of New York is distributed by race as shown in the following table:

Congressional District	*Total*	*White*	*Negro*	*Other*
Current Fourth, New York	467,384	444,969	19,720	2,695
Current Fifth, New York	391,403	309,046	81,177	1,180
Current Sixth, New York	507,685	478,051	26,298	3,336

I hereby certify, That according to a preliminary tabulation of the returns of the EIGHTEENTH DECENNIAL CENSUS OF THE UNITED STATES, on file in the Bureau of the Census, the population of the new Sixth, Seventh, and Eighth Congressional Districts of New York is distributed by race as shown in the table below:

Congressional District	*Total*	*White*	*Negro*	*Other*
New Sixth, New York	417,367	410,687	4,812	1,868
New Seventh, New York	459,844	362,662	95,809	1,373
New Eighth, New York	432,776	403,407	26,130	3,239

I hereby certify, That according to a preliminary tabulation of the EIGHTEENTH DECENNIAL CENSUS OF THE UNITED STATES, on file in the Bureau of the Census, the population

of the new Sixth Congressional District of New York is distributed by race as shown in the table below. The table also shows similar data for the portions of the three current (i.e., 87th Congress) districts from which the new Sixth has been constituted.

Congressional District	*Total*	*White*	*Negro*	*Other Races*
New Sixth, New York	417,367	410,687	4,812	1,868
Current Fourth, New York	365,427	359,169	4,604	1,654
Current Fifth, New York	32,655	32,370	175	110
Current Sixth, New York	19,285	19,148	33	104

I hereby certify, That according to the official count of the EIGHTEENTH DECENNIAL CENSUS OF THE UNITED STATES, on file in the Bureau of the Census, the population of the current (i.e., 87th Congress) Fourth Congressional District of New York is distributed by race as shown in the table below. On the basis of a preliminary tabulation, the table also shows similar data for the three portions into which the Fourth has been subdivided under the new apportionment, namely, the portions in the new Sixth, Seventh, and Eighth Congressional Districts.

Congressional District	*Total*	*White*	*Negro*	*Other Races*
Current Fourth, New York ...	467,384	444,969	19,720	2,695
New Sixth, New York	365,427	359,169	4,604	1,654
New Seventh, New York	43,364	28,137	14,860	367
New Eighth, New York	58,593	57,663	256	674

/s/ RICHARD M. SCAMMON, Director,
Bureau of the Census.